Before the Federal Communications Commission Washington DC 20554

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Request for Remand, Review of Administrator's)	
Decision and/or Petition for Waiver of FCC Rules	.)	Administrator's decision June 15, 2011
Donna Independent School District)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

Request for Remand, Review or Waiver

In accordance with Sections 54.719 through 54.721 of the Commission's Rules, now comes Donna Independent School District, Texas (Donna ISD) before the Federal Communications Commission (Commission) requesting remand to USAC, review or waiver of the Administrator's Decision on Appeal of a Commitment Adjustment (COMAD) by the Universal Service Administrative Company (Administrator). This request comes before the Commission in a timely manner from the Administrator's Decision on appeal dated June 15, 2011¹ and subsequent reply from USAC senior staff July 20, 2011², refusing a request to self-initiate an appeal of their decision due to exceptional legal circumstances.³

Applicant Name: Donna Independent School District

Billed Entity Number: 141639

FCC RN:

Service Provider: Integrity Communications

SPIN: 143018592 Funding Year: 2002

Form 471 Application Numbers: 437252, 437253, 437255, 437256, and 437259 Funding Request Numbers: 2125900, 1215901, 1215903, 1215904 and 1215911

Funding Year: 2004

Form 471 Application Numbers: 425434 and 425806 Funding Request Numbers: 1176490 and 1177559 Total Funds to be Recovered: \$5,606,563.94

¹ Attachment 1 "Administrator's Decision on Appeal – Funding Year 2002-2003" June 15/16, 2011 (one of seven in all)

² Attachment 2 "Email from Leslie Frelow – SLD Director-Post Commitment Operations" July 20, 2011

³ Attachment 3 "Email from Donna ISD to USAC Requesting Self-ID Review of Decision" June 30, 2011

Reason for Commitment Adjustment:

During the course of an investigation of various Donna financial practices by the Texas Education Agency (TEA) June through August of 2006, culminating in a report issued July 10, 2007⁴, TEA cited a "concern" that Donna had not reached out for 3 bids from perspective service providers when requesting an Operational SPIN Change from USAC in September of 2005. TEA cited Texas State Government Code 2157.0611 as the legal basis for their determination. USAC quoted the TEA investigation "concern" as the basis of their decision to issue Commitment Adjustment Notification letters for all listed FRNs, stating in the seven COMAD letters, "During an audit, it was determined that you did not comply with Texas State Government Code 2157.0611 that required the evaluation of three bids for purchases exceeding \$2,000, or documentation explaining why three bids could not be obtained. Since you failed to follow the applicable state procurement rules, the approved SPIN change is deemed invalid. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant."⁵

Request for Remand

Donna ISD hereby respectfully requests, for reasons presented below, that the Commission remand Donna ISD's original Appeal of the COMAD decisions listed above back to the Administrator and order that they hold any decision in abeyance until the Texas Attorney General issues its formal "Opinion" on the applicability of the Statute cited as reason for the "Concern" prior to issuing a Decision on the Appeal. Should the Texas Attorney General's Opinion indicate that the Statute was not legally applicable to Donna ISD as a "local government entity" then the basis for the "concern" becomes invalid and the singular rationale USAC used for the COMAD also becomes immediately invalid.

Donna ISD also requests that, should the Texas Attorney General (Texas AG) rule that the statute cited by TEA was legally applicable to Donna ISD as a local government entity, Donna ISD be allowed the opportunity to provide further documentation and evidence to support a review and request for waiver with the Commission.

Discussion

Donna ISD is an extremely low-wealth, socio-economically challenged school system comprised of approximately 15,000 students spread over 21 campuses, 14 elementary and 7 secondary, in extreme Southwestern Texas. Donna ISD has a strong need for technology resources and the District has applied for E-Rate funding support since the inception of the program. Donna ISD filed Form 471s timely and within program rules for the FY2002 and 2004 Priority 2 services in question. The FY2002 FRNs were not finally approved by the Administrator until May 24, 2005. Because of the time lag in approving FY2002 FRNs the original service provider was unwilling or unable to complete the project and the Donna ISD

⁴ Attachment 4: "Donna ISD - TEA Investigation Report – July 10, 2007"

⁵ Attachment 5: "USAC Notification of Commitment Adjustment Letter" example of 7 in all Feb 10 & 16, 2011

Board approved a request for Operational SPIN Change for all the listed FRNs in July of 2005. Donna submitted the request for Operational SPIN Change in September 2005 following instructions provided by the Administrator and the Texas State E-rate Coordinator and the SPIN change was reviewed and approved by the Administrator.

Unrelated to the E-rate program, as a result of a complaint filed with the Texas Education Agency (TEA) by a disgruntled former Donna ISD senior staff member, in June through September 2006 TEA conducted an investigation of Donna ISD's overall financial practices and procedures. TEA provided Donna ISD with a report of the results of that investigation on July 10, 2007. TEA cited several "concerns" related to Donna ISD financial practices, one of which was related to the E-rate program. The "Concern" indicated that: "...the district did not provide evidence in the response that it had obtained three quotes for the multi-million dollar contracts awarded to Integrity Communications under E-Rate Cycle 5 Cycle 7 and Cycle 9 funding in accordance with Government Code § 2157.0611." It is important to note that there was *no penalty or punishment* associated with this finding or applied to Donna ISD at the time. Donna ISD was merely required to review the report with the Board and take appropriate corrective measures.

However, without prior awareness or communication, on February 10 and February 16, 2011, almost 4 years later, Donna ISD received Commitment Adjustment Notification Letters from the Administrator, requesting that a total of \$5,606,563.94 over 7 FRNs be returned to USAC, and giving the following as the rationale in each case:

"On your request for an operational SPIN change submitted on September 2, 2005 to USAC, you certified that the SPIN change requested was allowed under all applicable state and local procurement laws. During an audit, it was determined that you did not comply with Texas State Government Code 2157.0611 that required the evaluation of three bids for purchases exceeding \$2,000, or documentation explaining why three bids could not be obtained. Since you failed to follow the applicable state procurement rules, the approved SPIN change is deemed invalid. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant."

Donna ISD appealed the Administrator's decision after determining, through the opinion and sound legal advice of Donna ISD legal counsel, that the citation of Texas Government Statute §2157.0611 by the Texas Education Agency (TEA) as the founding element of "Concern 1" listed in their "Audit Findings Report" of July 10, 2007⁶, and utilized by USAC as grounds for the commitment adjustment decision, was *incorrectly determined* through an error in the application of Texas Statutory Code. Donna ISD has cause to believe that Texas Government Statute §2157.0611 does not, in fact of law, apply to "local government" entities such as school districts, thereby invalidating the TEA "Concern 1" as stated in their report.

As a result, Donna ISD has legally challenged the validity of the Audit "Concern" and has requested, through Texas Congressman Peter Gallego, Chairman of the House Committee on Criminal Jurisprudence, a formal opinion from the Texas Attorney General as to the applicability of State Statute §2157.0611 to "local government" entities such as Donna ISD.⁷ We are

⁶ Ibid see Attachment 4: "Donna ISD TEA Audit Findings Report – July 10, 2007"

Attachment 6: Letter to Office of Texas Attorney General entitled: "Re: Whether Texas Local Government Code §2157.0611 applies to school districts"

confident that the results of these actions will be a determination that TEA came to the negative finding in their "Concern 1" in error through misapplication of Texas Government Statutes and that TEA will ultimately report that Donna ISD did not violate state procurement rules when applying for the Operational SPIN change. TEA was clear in the July 10th report that Donna ISD followed state and local competitive bidding procedures when selecting original service providers for the FRNs.

Because the decision of the Texas AG's Office is pivotal to the justification of the COMAD determination, Donna ISD, in our original Appeal to the Administrator, requested that USAC hold any decision on the Appeal and any action on the COMAD Letters listed above in abeyance while the legal request for opinion took its course and came to resolution through appropriate Texas statutory channels.⁸

The Administrator responded by requesting that Donna ISD provide the decision within 15 days or risk denial:

"Donna ISD has requested the formal opinions of the Texas Education Agency's Director of Financial Audits and the Texas Attorney General in regards to the Texas Local Government Code §2157.0611. At the time you submitted the appeal, you did not provide the formal opinions from the two parties. Please provide the supporting documentation." "

Donna ISD responded that we could not provide the formal opinions until they had been decided upon and that we were not able to control the length of time it took a formal process to proceed through the Texas legal system and again requested that they hold the decision on the Appeal until the Texas Attorney General issued their formal "Opinion." On June 15, 2011, the Administrator, without further communication or warning, issued Appeal denial letters for all FRNs, citing the fact that "you have failed to provide any evidence that USAC erred in its' COMAD determination." The Administrator completely ignored the fact that a legal challenge was in process, despite the fact that should the Texas AG opine that the statute was not legally applicable to Donna ISD as a local government entity, the basis for the TEA "concern" and the Administrator's COMADs would become moot.

Donna ISD responded to the Administrator in an email July 13, 2011 requesting that they reconsider the Appeal Denial through a self-identified review and hold any Appeal decision until the Texas Attorney General issues its ruling. We included the letter from the Texas Attorney General's Office outlining the legal process for "Opinion" procedures and providing a timeline for the decision. The Texas AG stated the Opinion would be issued "on or before December 24, 2011." The Administrator refused this request in a reply email July 20, 2011, stating: "We are

⁸ Attachment 7 – "Donna ISD Appeal of COMAD Decisions to USAC" April 5, 2011

⁹ Attachment 8 – "Email from Administrator Requesting Information Regarding Appeal"

¹⁰ Ibid – see Attachment 1 "Administrator's Decision on Appeal – Funding Year 2002-2003" June 15, 2011 (one of seven in all)

¹¹ Attachment 9: "Letter from the Office of Texas Attorney General regarding Opinion Process and Timeline"

unable to create a self-id appeal or review a new appeal concerning the same COMAD decisions." ¹²

The Administrator waited almost four years after having access to the results of the TEA investigation (July 2007) to issue COMAD decisions on the FRNs, but refused to wait another 6 months after learning that the Texas AG was undergoing a formal review relating to the legal applicability of the evidence they used to deny the FRNs.

Because of the severity of the penalty involved in the COMAD, the loss of \$5.6 million, and the fact that the TEA has indicated that they impose *no penalty* on school districts that do not comply with the statute cited in their Concern 1, Donna ISD requests that we be given the opportunity, once the Texas AG Opinion is issued (and if it upholds the applicability of the Texas Statute), to provide additional information and rationale in request of a waiver of applicable rules used as grounds for the Administrator's COMAD decision, further developing the following salient points:

- 1. Donna ISD followed all rules and requirements it was aware of in requesting an Operational SPIN change for the FRNs in question, asking both USAC and the Texas Erate Coordinator for proper instructions prior to filing the paperwork.
- 2. The SPIN change was reviewed and approved by the Administrator.
- 3. TEA and USAC indicated that the original contracts were procured following all FCC, USAC and state and local procurement rules.
- 4. The goods and services were critically needed to build the District technology network in support of student teaching and learning.
- 5. The E-rate "penalty" in this case rescinding \$5.6 million in awards far outweighs the apparent slight procurement violation (if it is found to be so) in this situation where the TEA considers the issue so minor that it imposes *no penalty* for violations.
- 6. The Texas Legislature amended Texas Education Code 44.031 (a) in June 2007, to remove government code 2157-0611 as a method to purchase goods or services. ¹³
- 7. Donna ISD could have used any one of the various methods under TEC 44.031 (a) to select a new contractor. ¹⁴
- 8. Donna ISD is in no financial position to be able to repay \$5.6 million to USAC and/or the FCC.

Conclusion

Donna ISD hereby respectfully requests, for reasons presented above, that the Commission remand Donna ISD's original Appeal of the COMAD decisions back to the Administrator and order that they hold any decision in abeyance until the Texas Attorney General issues its formal "Opinion" on the applicability of the Statute cited as reason for the "Concern" prior to issuing a Decision on the Appeal.

¹² Ibid – see Attachment 2 "Email from Leslie Frelow – SLD Director-Post Commitment Operations" July 20, 2011

 $^{^{13}}$ Attachment 10 – "History of HB 2918 (amendments to TEC 44 031(a)"

¹⁴ Attachment 11 - "HB02918F (Amendments to TEC 44 031(a)"

Donna also respectfully requests that, should the Texas AG rule that the statute cited by TEA was legally applicable to Donna ISD as a local government entity, that Donna be allowed the opportunity, after delivery of the Texas AG Opinion, to provide further documentation and evidence to support a review and request for waiver of the Administrator's decision with the Commission.

Respectfully submitted this 12th day of August, 2011,

/s/

Roberto Loredo Superintendent Donna Independent School District P.O. Box 871 / 207 N Third Donna, TX 78363 (956) 464-1600

David Chavez Instructional Technology Director Donna Independent School District Donna, TX 78363 (956) 464-1660

Submitted by:

Daniel L. Farslow E-Rate Central – Midwest 1285 Bluff Avenue Columbus, OH 43212 (614) 487-9567





Administrator's Decision on Appeal - Funding Year 2002-2003

June 16, 2011

Daniel L. Farslow E-Rate Central 1285 Bluff Avenue Columbus, OH 43212

Re: Applicant Name:

Donna Independent School District

Billed Entity Number:

141639 437255

Form 471 Application Number: Funding Request Number:

1215903

Your Correspondence Dated:

April 5, 2011

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Year 2002 Commitment Adjustment Decision for the Application Number indicated above. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your letter of appeal included more than one Application Number, please note that for each application for which an appeal is submitted, a separate letter is sent.

Funding Request Number:

1215903

Decision on Appeal:

Denied

Explanation:

On April 5, 2011 and May 9, 2011, you provided documentation and a response to USAC in regards to a Commitment Adjustment (COMAD) letter. USAC has determined based on this documentation and response that you did not provide the supporting documentation with regards to the violation of the state and local procurement laws. You have failed to provide any evidence that USAC erred in its COMAD determination. Consequently, the appeal is denied.

If your appeal has been approved, but funding has been reduced or denied, you may appeal these decisions to either the SLD or the Federal Communications Commission (FCC). For appeals that have been denied in full, partially approved, dismissed, or cancelled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date on this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We thank you for your continued support, patience, and cooperation during the appeal process.

Schools and Libraries Division Universal Service Administrative Company

CC: Roberto F. Loredo
Donna Independent School District
116 North 10th Street
Donna, TX 78537



Daniel Farslow

From: Leslie Frelow [Ifullwood@usac.org]
Sent: Wednesday, July 20, 2011 6:16 PM

To: dfarslow@e-ratecentral.com

Cc: Eric Flock

Subject: Donna ISD Appeal Decision

Hello Dan:

Mr. Eric Flock forwarded your email regarding Donna ISD Appeal decision to me. Thank you for sending your email and your request to hold USAC's Appeal decision until the Texas Attorney General issues its opinion. We are unable to create a self-id appeal or review a new appeal concerning the same COMAD decisions. I would encourage you to submit an appeal to the FCC concerning the COMAD decisions. In your appeal, please explain the circumstances surrounding Donna ISD's Request for Opinion.

If you have any questions, please don't hesitate to contact me.

Leslie Frelow

Director, Post-Commitment Operations | Schools & Libraries Division
Universal Service Administrative Company (USAC)
2000 L Street, NW Ste 200 Washington, DC 20036 | <u>Lfrelow@USAC.org | 202-772-5231</u> (T) | 202-776-0080 (F)



Daniel Farslow

From: Daniel Farslow [dfarslow@e-ratecentral.com]

Sent: Thursday, June 30, 2011 4:29 PM

To: 'eflock@usac.org'; 'eflock@sl.universalservice.org'

Cc: 'Baumann, Jennifer'; 'George McDonald'

Subject: Donna ISD APPEAL Decision - Request for Review

Attachments: Donna ISD - Letter from Texas AG to Rep Gallego Outlining Request for Opinion Process

and Timeline - 29June2011.pdf; Donna ISD - Appeal Decision Letter - COMAD USAC Appeal - 1176490 - June 15 2011.pdf; Donna ISD - Appeal Decision Letter - COMAD USAC Appeal - 1177559 - June 15 2011.pdf; Donna ISD - Appeal Decision Letter - COMAD USAC

Appeal - 1177539 - June 16 2011.pdf; Donna ISD - Appeal Decision Letter - COMAD USAC Appeal - 1215900 - June 16 2011.pdf; Donna ISD - Appeal Decision Letter - COMAD USAC Appeal - 1215903 - June 16 2011.pdf; Donna ISD - Appeal Decision Letter - COMAD USAC Appeal - 1215904 - June 16 2011.pdf; Donna ISD - Appeal Decision Letter - COMAD USAC

Appeal - 1215911 - June 16 2011.pdf

Eric,

Recently, Donna ISD received Appeal decisions from USAC denying appeals of COMAD decisions (attached above) for several FRNs as well as our request for abeyance of the appeal decision until the Texas Attorney General's Office (AG) completed a formal response to a request for Opinion on the applicability of the statute chosen to base a "finding" against Donna ISD that resulted in the COMAD letters subject to appeal. In the appeal itself and in subsequent responses to questions posed by J. Baumann, we noted that Donna ISD, through the Chairman of a Texas Legislative Committee, filed a formal Request for Opinion with the Texas AG because there is serious legal concern that the statute used in the TEA finding does not apply to "local government entities" of which Donna ISD is one. We requested that the appeal decisions be held in abeyance until the Texas AG decision was forthcoming. We followed up the request with another email keeping USAC up to date on progress and again requested that USAC hold off on the decision until the Texas AG provides an Opinion. However, unfortunately, USAC chose to send appeal denial letters for all FRNs because ".....you did not provide the supporting documentation with regards to the violation of the state and local procurement laws. You have failed to provide any evidence that USAC erred in its' COMAD determination." We were provided no indication that USAC would not consider our request for abeyance and no notification from USAC that there was a date after which USAC would deny the appeals if information was not forthcoming.

We feel that USAC was in error, and may have abrogated due process, when it did not provide Donna ISD any notification or response with a timeline when the appeals would be denied after our initial and secondary response to Ms Baumann, and did not let us know whether USAC would hold the appeal decision in abeyance until the Texas AG ruled on the case. Our understanding of USAC's 7-day procedures is that USAC will not implement the procedure if the applicant is making a good-faith effort to respond to USAC's inquiries. We feel it is evident that Donna ISD was acting in good-faith in this instance and its appeal should not have been denied for circumstances beyond its control.

Please review the attachment above - a letter from the Texas AG Office to Chairman Gallego outlining the formality of the Request for Opinion and setting the process and timetable for the decision (along with the original request for Opinion from Chairman Gallego on behalf of Donna ISD). As you will see, the Texas AG is statutorily given 6 months to complete a decision (a long time - not unlike many state and federal processes we know). However, the decision is critical to Donna ISD, since, if the decision is that the statute does not apply, TEA has no finding and USAC's citation of the finding as cause for COMAD is not applicable.

Given the severity of the COMAD, the seriousness of the statutory Opinion and the availability of documentation of the process and timeline of the Texas AG decision-making process in the Request for Opinion, Donna ISD respectfully requests that USAC correct its error of prematurely denying the appeal by creating a self-identified appeal. We also request that the new appeal be held in abeyance until the ruling of the Texas AG, on or before December 24, 2011.

Thank you for your consideration of this request to rescind the negative Appeal decisions and hold any decision until the Texas AG rules on the Request for Opinion.

Sincerely,

Dan Farslow

Daniel L. Farslow, PhD
E-Rate Central - Midwest
Phone 614.487.9567 or 516-801-7823
Fax 614.487.9362 or 516-801-7833
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www.e-ratecentral.com

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ATTACHMENT 4

MEMORANDUM

TO:

Dr. Adrain Johnson, Associate Commissioner, School District Services

ec

FROM:

Rita Chase, Director of Financial Audits

DATE:

July 10, 2007

SUBJECT:

Investigation at Donna Independent School District #108-902

In July, August and September 2006, Texas Education Agency (TEA) auditors from the Division of Financial Audits conducted an on-site investigation at the Donna Independent School District (DISD) to follow up on complaints forwarded to this office. The exhibits in this report contain illustrations of investigative findings and are not all-inclusive.

This report supersedes the prior report dated January 3, 2007, and reflects the TEA auditors' analysis of the district's response to the original findings.

We disclosed, through verbal inquiries and examination of district records, the following:

 Concern: Donna ISD did not competitively procure three federal grants and the matching state money according to federal and state regulations.

Original Findings: The district provided the auditors with documentation showing that in their initial application for E-Rate cycle 5 funding, the district competitively procured services and awarded contracts (subject to funding) as required under state and federal regulations. However, according to district officials, the district's initial application was denied.

During fiscal year 2004 the district applied for E-Rate cycle 7 funding and reapplied for E-Rate cycle 5 funding. Once again the district had documentation showing that district had followed state and federal competitive procurement regulations in awarding contracts. The district was denied again for E-Rate cycle 5 funding, but following an appeal the district was awarded funding for E-Rate cycle 5 and E-Rate cycle 7.

In fiscal year 2005 the DISD board of trustees voted to do a spin change and award the E-Rate cycle 5 and E-Rate cycle 7 contracts to a new vendor named Integrity Communications. The district did not provide documentation evidencing that the original awarded contracts had been rescinded by the school board and that these new contracts were competitively procured in accordance with state and federal regulations.

In fiscal year 2006, the DISD board of trustees voted to award additional contracts to Integrity Communications under E-Rate cycle 9 funding. The district did not provide the auditors with documentation evidencing that these contracts had been competitively procured as required by state and federal regulations.

Dr. Adrain Johnson July 10, 2007 Page 2 of 14

In addition, according to school district records, Integrity Communications was paid \$585,863.01 between April 14, 2005 and July 17, 2006 (see Exhibit A). The auditors requested information on the status of the work on projects awarded to Integrity Communications. The only response received by the auditors was a written statement from the district stating that none of the work bad been completed.

Analysis of the district's response to the original finding

The board of trustees voted on July 21, 2005, to approve the E-Rate an Operational Service Provider Identification Number (SPIN) change (a request to change the service provider associated with a particular funding request number) Summary Year 5 (2002) Re-file and Operational SPIN Change Summary Year 7 (2004) (see PDF file: bb binder 1 E-Rate Cycle 5 Cycle 7 and Cycle 9 page 143 of 370). However, the district did not provide information explaining this action since contracts had already been awarded by the district.

In addition, the district did not provide evidence in the response that it had obtained three quotes for the multi-million dollar contracts awarded to Integrity Communications under E-Rate 5, E-Rate 7 and E-Rate 9 funding in accordance with Government Code § 2157.0611.

It is noted that the district check number 125679 dated July 17, 2006, in the amount of \$181,250.54 was voided (see PDF file: bb binder 1 E-Rate Cycle 5 Cycle 7 Cycle 9 addendum page 1 of 15). Purchase order number 269212 in the amount of \$181,250.54 to Integrity Communications was actually paid with check number 125683 dated July 17, 2006, in the amount of \$181,250.54 for an awarded E-Rate 5 project (see PDF file: bb binder 1 E-Rate Cycle 5 Cycle 7 Cycle 9 addendum page 1 of 15). It is also noted that this results in an amount of \$404,612.47 paid to Integrity Communications between April 14, 2005 and July 17, 2006, including \$181,250.54 for an awarded E-Rate 5 project. Exhibit A of this report has been modified to reflect this amount. In addition, the district provided a copy of purchase order number 269284 in the amount of \$293,620.42 and attached invoices from Integrity Communications which, according to the district, will become part of E-Rate 9 pending funding approval (see PDF file: bb binder 1 E-Rate Cycle 5 Cycle 7 Cycle 9 addendum pages 2-15 of 15)

 Concern: A Donna ISD school board member has moved out of the district but has not vacated the position on the school board.

Original Finding: According to district personnel, a member of the Donna ISD board of trustees moved out of the district sometime during the summer of 2006. It is to be noted that this matter is being addressed by local judicial authorities.

Analysis of the district's response to the original finding

According to the district, the move was temporary and the board member moved back to the district in December 2006. This finding is resolved since the board member in question has moved back into the district.

 Concern: Two Donna city council members and a municipal judge are employed by the district; therefore, hold incompatible offices in accordance with local board policy BBFB (Legal) dealing with incompatibility of office (see Exhibit B, page 3).

Original Findings:

 The attendance coordinator for the district enforces the rules and laws dealing with compulsory student attendance. However, this individual also presides as Dr. Adrain Johnson July 10, 2007 Page 3 of 14

municipal court judge for the city of Donna, Texas. Donna ISD students that are being adjudicated for possible violation of other laws may be required to appear before his court of law. He may have an ongoing relationship with these students as attendance coordinator because of their attendance problems. Therefore, these offices may be incompatible since there appears to be overlapping jurisdictions. It is to be noted that, according to district personnel, this person has served as municipal judge for the city of Donna prior to being employed by the district in 1999.

During the auditors' on-site investigation, concerns were expressed by local district patrons that they had witnessed, on several occasions, the district's attendance coordinator not on district premises and involved in non-school related activities during regular work hours. One of the activities was spending time at a local restaurant. According to the superintendent, the district allows the attendance coordinator a flexible work schedule in order to carry out the duties of municipal court judge. The auditors discussed with the superintendent the concern that the attendance coordinator was frequenting a local restaurant during regular work hours. A local district patron contacted the auditors one morning about this employee being at the restaurant during his regular work hours. The superintendent stated that he had discussed this specific concern with the employee and was told that he had stopped by the restaurant to pick up a cup of coffee. The auditors informed the superintendent that they had also observed this individual for about 30 to 45 minutes the following morning at the restaurant during his regular work hours. The superintendent stated that he would discuss this additional concern with the employee in question.

Analysis of the district's response to the original finding

The district indicated that the State Commission on Judicial Conduct performed an investigation in 2005. The district contends that, according to a letter dated February 27, 2006, the Commission determined there were no ethical violations made by the municipal judge with respect to his duties and responsibilities as a district employee (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 70 of 393).

2. The district's Mentoring At-Risk Students (MARS) liaison officer in the Special Programs and Services Department is also a Donna city council member. According to district records, on September 11, 1996, at the recommendation of the MARS liaison committee, this individual was hired by the district with a starting salary of \$18,500 (see Exhibit C, page 1). This individual's salary was \$34,513.39 for fiscal year 2007 without evidence of significant additional duties or responsibilities assigned to this person (see Exhibit C, page 2).

In a letter dated August 7, 2002, addressed to the former superintendent, one of the duties of this individual was "Solidifying cooperation between Donna P. D. and our I. S. D. (as City Commissioner)" (see Exhibit D, page 1). According to documentation provided by the district, on August 8, 2002, the school board was presented with a pay raise of \$3,000 for this individual (see Exhibit D page 2). The Donna ISD board of trustees approved the pay raise on October 21, 2002 (see Exhibit D, page 3).

Dr. Adrain Johnson July 10, 2007 Page 4 of 14

According to school district records, on October 22, 2002, the former superintendent increased this amount to \$5,000, with a retroactive date of August 12, 2002 (see Exhibit D, page 4).

Analysis of district's response to original finding

According to the district, the salary adjustment for this individual was made as compensation for additional duties and for yearly increases that were provided to all employees. A September 4, 1996, memorandum recommended this individual for the Mentoring At Risks Students (MARS) liaison position (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 206 of 393). Provided documentation included a listing and employee pay sheets showing annual salary increases for this individual from fiscal year 1998 through fiscal year 2007 (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 102 of 393). A June 16, 1999, memorandum from the director of student support services to the former superintendent indicated that this individual had been employed by the district for three years but had not received any yearly pay or step increments as had other employees. It also contained a recommendation for the individual to receive a pay raise of \$3,753 and placement on a step salary schedule so that this oversight would be hence avoided (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 246 of 393). In addition, the listing indicated a "Board Approved Annual Increase" with an annual salary increase of \$2,269 in fiscal year 2000 (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 102 of 393).

This individual received an annual salary increase of \$495.55 plus \$8,000 "increase for additional duties" (\$3,000 approved August 28, 2002 and \$5,000 approved on October 28, 2002) in fiscal year 2003 as noted on the listing. An October 23, 2002, memorandum from the director of support services to the MARS liaison officer stated "As per Board Action on October 21, 2002, you have additional duties as outlined in memos dated August 7, 2002 and October 21, 2002, effective immediately (see PDF file: see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 289 of 393)." Another memorandum dated October 18, 2002, from the director of support services to the former superintendent indicated that this individual was assigned additional duties beyond the MARS liaison duties (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 289 of 393). On October 21, 2002, the board of trustees voted and approved the former superintendent's recommendation concerning at-will employment. According to the at-will recommendations attachment to the October 21, 2002 board minutes, a salary increase of \$3,000 (manually changed to \$5,000) was approved for this individual due to additional duties (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge addendum page 1 of 9).

In fiscal year 2007, this individual received an annual salary increase of \$1,248 (\$748 2006-2007 increase and \$500 TRS supplement added to salary as noted on employee pay sheet) an additional \$4,000 (Mi Amigo Mi Maestro Mentoring Program) paid on December 20, 2006, as noted on the listing (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 102 of 393). An April 12, 2005, memorandum from the director of support services to the director of human resources regarding funds budgeted under the Mi Amigo Mi Maestro Mentoring Program grant for a liaison officer requested that these duties be added to the individual and accordingly a salary increase (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge addendum page 1 of 9). An October 19, 2005, memorandum from the director of support services to the assistant

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superintendent for Human Resources informed his office that this individual had completed his final hours for the Mi Amigo Mi Maestro Mentoring Program grant for the 2004-2005 school year and a final payment was due (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge addendum page 1 of 9). A December 2, 2005, memorandum from the mentor coordinator with La Puesta Del Sol to the assistant superintendent for Human Resources stated that this individual had fulfilled his duties of completing one-third of the responsibilities for the Mi Amigo Mi Maestro Mentoring Program (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge addendum page 4 of 9).

Finally, a March 10, 2006, memorandum from the assistant superintendent for Human Resources to the former chief financial officer requested a \$4,000 payment to this individual since he had completed three-fourth of the Mi Amigo Mi Maestro Mentoring Program responsibilities (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge addendum page 2 of 9).

The district did not provide sufficient information for the auditors to ascertain whether these salary increases were the appropriate amounts as approved by the board of trustees.

3. The custodial supervisor for the Donna ISD is also a Donna city council member. The district hired this individual on September 8, 2003 (see Exhibit E, page 1). In a letter to the former superintendent dated September 15, 2003, the Director of Custodial/Warehouse/Fixed Assets wrote "Due to the growth of the district and the increase of students at every campus, I am recommending that the Custodial Supervisor position be set at \$32,000 due to the fact, that the position will require a more diversified work schedule" (see Exhibit E, page 2). According to a district Employee Assignments Sheet this was an increase from \$24,400 which was his previous salary showing the same job title and duties as when hired in this position (see Exhibit E, page 3). According to a 2005-2006 district employee pay sheet provided by the district, this individual's salary was increased by \$5,000 to \$38,694.40 in fiscal year 2006 (see Exhibit E, page 4). The district's employee pay sheet for fiscal year 2007 indicated a salary increase to \$40,154.40 (see Exhibit E page 5). It appears that this individual's accumulated salary increase from September 2003 to his current total salary for fiscal 2007 was \$15,754.40 or approximately 64% without evidence presented of significant additional duties or responsibilities assigned to this person. It appears that these pay raises were approved by the school board; however, there was no evidence presented to the auditors to justify these substantial increases in salary for this individual considering other district employees with comparable duties and responsibilities.

Analysis of the district's response to the original finding

According to the district, the salary adjustment for this individual was made as compensation for additional duties and for yearly increases provided to all employees. Provided documentation included a listing and employee pay sheets of annual salary increases for this individual beginning with fiscal year 2004 through fiscal year 2007 (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 332 of 393). The annual salary increases included the following:

Fiscal year 2004: \$7,600.61 as noted on the listing;

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> Fiscal year 2006: \$960 salary increase plus \$5,000 for additional duties and "Board action to place all custodians under direct supervision of Custodial Supervisor" as noted on the listing;

Fiscal year 2007: \$1,460 (\$960 and \$500 TRS supplement added to salary as

noted on the employee pay sheet).

The district did not provide sufficient information for the auditors to ascertain whether these salary increases were the appropriate amounts as approved by the board of trustees.

The Donna ISD Board Policy Manual BBFB – Ethics: Prohibited Practices #7 states: "One person may not occupy two legally incompatible offices. Offices are legally incompatible when the faithful and independent exercise of one would necessarily interfere with the faithful and independent exercise of the other. A person may not serve in one branch of government while exercising any powers properly attached to either of the other branches of government."

Attorney General Opinion JM-634 states: "If a person holding an office is elected or appointed to another (where the two offices cannot be legally held by the same person) and he accepts and qualifies as to the second, such acceptance and qualification operate, ipso facto, as a resignation of the former office."

Analysis of the district's response to original finding

The district included in its response a letter dated February 16, 2007, from the general counsel for the City of Donna, Texas regarding the issue of the Donna ISD employment of two individuals serving as city commissioners of the City of Donna and one individual as municipal judge of the City of Donna (see PDF file: dd binder 3-2 Donna City Council Mem and a Municipal Judge page 367 of 393). In the opinion of the Mr. Javier Villalobos Attorney-At-Law, the two city commissioners employed by the district do not run afoul of the Texas Constitution constraints and the position of municipal judge and attendance coordinator are not incompatible as to the common law doctrine of incompatibility.

In addition, it is noted that the district has requested an opinion from the Texas Attorney General on whether a school district may legally and permissibly employ a councilman from an incorporated town situated within the boundaries of the school district. The required action will be held in abeyance until an opinion is received by the Agency.

 Concern: The superintendent was paid in excess of what was stipulated in his employment contract with the district.

Original Findings:

 The contract with Donna ISD dated August 16, 2004, for the position of interim superintendent was effective for the period from August 3, 2004 to June 30, 2005.

The interim superintendent's contract stated that the district would provide the interim superintendent with an annual salary of \$128,000 (see Exhibit, F page 2).

According to a 2004-2005 district employee pay sheet dated September 21, 2004, the interim superintendent's contract was set on a 226-day (normal days)

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contract period as adopted by the school board (see Exhibit F, page 4). In addition, the pay sheet indicated that the actual number of days were from August 3, 2004, to June 16, 2006, or 205 actual days at a daily rate of \$566.37. However, a note on the pay sheet stated "CORRECTED COPY..... Per Mr. Gonzalez, the Board approved \$128,000 for the remainder of the 04-05 year. The allowances remain the same" (see Exhibit F page 4). It appears the superintendent's salary for the 2004-2005 year should have been paid at a daily rate of \$566.37 for 205 days for an annual salary of \$116,105.85 instead of the total salary of \$128,000 that was paid by the district (see Exhibit F, pages 4 and 6).

- 2. According to the superintendent, he and his spouse (employed by San Benito ISD) were involved in an automobile accident and sustained serious injuries that required hospitalization for a period of time. According to a letter from the district to Harrington Benefit Services dated August 30, 2005, the district was to cover medical expenses not covered by other insurance service providers (see Exhibit G). According to district officials, it is not the practice of the district to pay the full claim (100%) as a secondary provider. In addition, district officials stated that additional amounts were paid by the district; however, the auditors requested but were not provided with this information.
- 3. The superintendent received reimbursement for cellular phone usage from August 3, 2004, to June 30, 2005. The district issued check number 353011 dated July 21, 2005, in the amount of \$1,220.21 as reimbursement for cellular phone usage. According to school district records, it appears that an expense allowance of \$500.00 per month and \$150.00 per month for cellular phone expenses was paid to the superintendent from July 2005 to June 2006 (see Exhibit H). However, these payments were according to the previous annual contract for the 2004-2005 year. In addition, check number 122124 dated April 12, 2006, was issued to the superintendent for the purchase of cellular phones and equipment. The superintendent's contract did not allow for cellular phone expense reimbursement nor did the district provide a local policy that allowed for cellular phones to be provided to employees (Exhibit I, page 6).
- 4. The 2004-2005 interim superintendent contract indicated the "use of the school district's Superintendent's suburban" (see Exhibit F, page 2). Furthermore, the 2005-2006 contract states "The Superintendent shall be required to have a motor vehicle necessary for the performance of his duties. The District shall pay for the routine and necessary maintenance of said vehicle" (see Exhibit I, page 6). During the on-site investigation, the superintendent stated to the auditors that he has continued to use the district's Suburban. The district did not present the auditors with documentation detailing the activities associated with the use of the district's Suburban. It is to be noted that the superintendent's utilization of the district's Suburban for personal use could be construed as reportable income in accordance with Internal Revenue Service (IRS) rules.

Analysis of the district's response to original finding

According to the district's response, the finding that the superintendent's salary for the 2004-2005 year should have been at a daily rate of \$566.37 for 205 days for an annual salary of \$116,105.85 instead of \$128,000 is not supported by the terms of the contract and the superintendent's understanding of the negotiated amount of salary when he accepted the job.

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The district provided a copy of the interim superintendent agreement signed August 16, 2004, for employment of the interim superintendent for the district from August 3, 2004 to June 30, 2005 (see PDF file: ee binder 4 Superintendent's Contract pages 2-5 of 391). The agreement stated, in part, "The district shall provide the Interim Superintendent with an annual salary in the sum of One Hundred Twenty-Eight Thousand Dollars and no/100's (\$128,000.00) with any raise given other professional employees in the new fiscal year. The annual salary rate shall be paid to the interim superintendent in equal installments consistent with the Board's policies." The other benefits included in the agreement were as follows: monthly expense allowance of \$500; monthly cellular phone allowance of \$150; use of the school district's superintendent's suburban; reasonable professional fees not to exceed \$250 per year; and health and life insurance for the interim superintendent and immediate family.

In addition, the district also provided a copy of the interim superintendent's employee pay sheet dated September 21, 2004, with a base salary of \$128,000 including a note "CORRECTED COPY..... Per Mr. Gonzalez, the Board approved \$128,000 for the remainder of the 04-05 year. The allowances remain the same (see PDF file: ee binder 4 Superintendent's Contract pages 7 of 391 and 62 of 391)." The district also provided two other employee pay sheets dated August 18, 2004, and August 24, 2004 regarding the superintendent's salary for the 2004-2005 year (see PDF file: ee binder 4 Superintendent's Contract pages 62-64 of 391). It is noted in the response, that the superintendent both lacked knowledge of and was not presented for review any of the three employee sheets filed in his personnel file. According to the district's response, the superintendent denies the statement noted on the pay sheet dated September 21, 2004.

A letter dated February 2, 2007, from the assistant superintendent for human resources stated that the calculations of Mr. Joe D. Gonzalez's salary for the 2004-2005 year were incorrect. The letter stated that "Contingent upon the salary agreed by the School Board and Mr. Joe D. Gonzalez is that of \$128,000.00 for the year 2004-2005, none of the calculations are correct." The letter further stated "The amounts paid on the monthly basis are correct." According to the letter, the correct daily rate for 205 days is \$624.39 (see PDF file: ee binder 4 Superintendent's Contract page 61 of 391).

According to the district's response, during this period district administrators were given a three percent salary increase. However, the superintendent was never provided an increase of \$3,840 in accordance with his contractual agreement.

In addition, the district provided an undated memorandum to the superintendent from Mr. Ruben R. Pena Attorney-At-Law stating "The parties had agreed on the \$128,000 for the August to June period (see PDF file: ee binder 4 Superintendent's Contract page 59 of 391)." The district provided an affidavit signed by the superintendent stating "The understanding between myself and the board was that I would accept the interim superintendent position at a salary of \$128,000 for the remainder of the 2004-2005 school year (see PDF file: ee binder 4 Superintendent's Contract page 13 of 391)." The affidavit also stated "During negotiations between the board and myself; there was never any mention of entering into a 226 day contract nor was there any discussion or reference stated that \$128,000 salary would be prorated by 226 days (see PDF file: see PDF file: ee binder 4 Superintendent's Contract page 13 of 391)." The board of trustees voted on August 2, 2004, to employ the interim superintendent "based upon the terms set forth as the Interim

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Superintendent agreement discussed in Executive Session for as may be altered by the district attorney" as noted in the board minutes (see PDF file: ee binder 4 Superintendent's Contract page 21 of 391).

A resolution approved by the board of trustees on March 22, 2007, concerning the superintendent's employment contracts and benefits stated in part the following: "Section 1. The Board hereby determines by a majority vote that the contractual agreements entered into with the Superintendent in August, 2004 and December, 2004 contain vague and ambiguous terms; Section 2. The Board has reviewed the salary and benefits that have been provided to the Superintendent during his employment with the District and the Board hereby determines by a majority vote that the Superintendent has neither been under-paid nor over-paid and his salary and benefits have been provided to him based on the contractual interpretation of the District's administration and the intent of the Board during contractual negotiations; Section 3 The Board hereby determines that the Superintendent's contracts and benefits were clarified with the August, 2005 contractual agreement and as modified by the December 2006 addendum (see PDF file: aa Donna ISD General Responses to Dr. Johnson page 34 of 122).

The district's response to finding number two of concern four does not appear to address the concern that the district may have paid the full claim of the superintendent's spouse including the portion of the claim that was required to be paid by the claimant.

The district's response to finding three of concern four states that check number 353011 dated July 21, 2005 in the amount of \$1,220.21 was issued to the superintendent for benefit allowances that were to be included in the July 2005 check. However, since the paperwork was not submitted to the payroll department in time, a separate check was issued. The response further states that these benefits were covered by the superintendent's contract for the 2004-2005 year. According to the district, check number 122124 dated April 12, 2006, in the amount of \$218.70 was for the purchase of a cellular phone case for the superintendent for usage of the district issued cellular phone. The district contends that the items were purchased with local funds out of the superintendent's office account in accordance the TEA Financial Accountability Resource Guide (see PDF file: aa Donna ISD General Responses to Dr. Johnson page 71 of 122). If the cellular phone is the property of the district as stated in the district's response, then purchase of the case for the cellular phone is considered a supply item.

The additional information provided in the district's response indicated that the superintendent did not receive an expense allowance of \$500 and \$150 cellular phone expenses in the 2005-2006 year. The TEA auditors' analysis substantiates the district's response concerning this area of the findings.

On the issue dealing with the superintendent's use of a district owned vehicle, the board of trustees voted on November 14, 2006, to cease providing a school vehicle to the superintendent and to grant him a monthly allowance of \$1,000. The district executed an addendum to the superintendent's contract on December 20, 2006, which states in part "The District shall provide the Superintendent with a travel benefit to be included as additional salary in the sum of one thousand dollars (\$1,000) per month for travel while performing the Superintendent's duties within the counties of Hidalgo, Starr, Cameron, and Willacy. This consideration is made in lieu of mileage expense reimbursement, gasoline, insurance, or other charges associated with such travel." According to the response, the superintendent

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surrendered the use of the Suburban on December 20, 2006. In consultation with a certified public accountant, the district's business office staff members prepared mileage charts and reconciled the superintendent's W-2 forms for the 2004-2005 and 2005-2006 years to reflect the additional monies due to the fringe benefit. It appears that the district has addressed this area of the findings.

5. Concern: The federal grant money is being used by the district for unallowable costs.

Original Findings: Review of the district's federal program expenditures for fiscal year 2006 disclosed instances of expenditures that appeared to be for unallowable purposes. This has been referred to the Financial and Compliance section of this office for further follow up.

Analysis of the district's response to original finding

The district is of the opinion that it properly utilizes federal grant money in compliance with federal laws and regulations (see PDF file: aa Donna ISD General Responses to Dr. Johnson page 75 of 122). The district also notes that this matter is being reviewed by the Financial and Compliance section of this office.

Concern: Donna ISD is expending funds that do not appear to be necessary for the conduct
of public schools.

Original Findings: The auditors' review of school district records for fiscal year 2006 disclosed that the district had purchased National Football League (NFL) insignia men and ladies watches as evidenced by check number 119197 dated February 3, 2006, in the amount of \$1,374.95. Purchase order number 258355 on file at the district contained a notation indicating that 17 "coaches series men" and "2 NFL starlet ladies fashion series" were purchased by the district. In addition, according to purchase order number 259189 on file at the district, a coaches' series watch costing \$78.45 was purchased by the district (see Exhibit J, page 1). According to district personnel, this watch was given to the superintendent.

The district presented the auditors with a letter dated August 22, 2006, listing "employees who were presented with watches as recognition for their work" (see Exhibit J, page 2). According to the superintendent, the district gave certain employees a wrist watch in recognition of their efforts in the renovation of the school board room and the staff development center.

In addition, an administrative decision was made to also give the superintendent a watch. The district did not present the auditors with evidence that this was approved by the school board. In addition, the auditors' review of school district records for fiscal year 2006 disclosed purchases that did not appear to be necessary for the conduct of pubic schools in accordance with the Texas Education Code (TEC), Section 45.105 (see Exhibit J, pages 3-4). According to the superintendent, these costs were incurred by the district for events and meetings held throughout the year in order to show appreciation and to recognize district staff.

Attorney General Letter Opinion number 96-136 dated December 12, 1996, states "A county may use proceeds of a five cent surcharge on vending machines in the county courthouse to purchase small gifts, plaques, or flowers for funerals, weddings, or retirements of county employees if the county determines that such use will enhance employee morale." The opinion further states that "Such an expenditure would not as a matter of law violate article III, section 52 of the Texas Constitution" dealing with

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gift of public funds (see Exhibit J, pages 5-6). However, the amounts awarded by the district may be in excess of what would be construed as nominal.

Analysis of the district's response to original finding

We note that it is the position of the district, concerning the purchase of the watches, that local board policy CH (Local) authorizes the superintendent to make expenditures up to \$25,000 without board approval (see PDF file: gg binder 6 Unnecessary Expenditure of Funds page 3 of 50). We also note that the district has requested an opinion from the Texas Attorney General on these matters. The required action will be held in abeyance until an opinion is received by the Agency.

7. Corcern: The Donna ISD is not doing criminal background checks as required by law.

Original Findings: Review of bus driver files disclosed that the district had not conducted criminal background checks of school bus drivers. It was noted in a Donna ISD Internal Audit department report dated May 26, 2006 concerning the transportation department, that the internal audit department was not allowed access to the employees' criminal history records. The district provided the auditors with current criminal background checks for bus drivers that were dated subsequent to the auditors' initial visit. According to the Texas Education Agency School Transportation Allotment Handbook, the operator of a school bus shall meet all prescribed standards and qualifications adopted by the Department of Public Safety for a school bus operator. In addition, personnel files that were examined during the on-site investigation did not contain evidence of criminal background checks.

Analysis of the district's response to original finding

The district contends that if the appropriate school officials would have been interviewed then the auditors would have been informed as to the location of the criminal background checks of bus drivers. District personnel informed the auditors that the superintendent's office was reviewing all requests.

Concern: The Donna ISD is in possible violation of the nepotism laws.

Original Findings: The district provided documentation to the auditors indicating the dates of employment for certain employees and the dates that the board members related to these employees occupied their position on the school board. Based on the information provided, it appears that the district may be in possible violation of the nepotism laws (see Exhibit K).

Analysis of the district's response to original finding

As part of the response the district provided a local policy DC (LOCAL) with an issuance date of May 22, 2006, which states in part "The Board delegates to the Superintendent final authority for the selection and employment of all at-will employees and certified contractual employees other than central office contractual personnel (see PDF file: ii binder 8 Possible Violation of Nepotism Laws addendum page 1 of 12)." We note that the board of trustees voted on August 31, 2004, to transfer hiring authority to the superintendent. However, the board minutes also stated that the district would contact the TASB and place on the board packet for approval later (see PDF file: ii binder 8 Possible Violation of Nepotism Laws addendum page 2 of 12). In consultation with the TEA legal division, the transfer of hiring authority would not be effective until the board of trustees adopted a policy. However,

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according to information provided by the district, this is subsequent to the individuals in question and their dates of election and their dates of employment.

- 9. During the course of the on-site investigation, the auditors noted additional deficiencies in the district's internal and budgetary controls, as follows:
 - a) During the 2006 fiscal year the district processed 1,604 transactions without purchase orders. The district also processed 2,543 transactions that exceeded the line items on the purchase orders. Of these, 176 transactions were 150% or more over the approved purchase order amount;

For example, purchase order number 246629 dated August 11, 2005, was approved for \$499.00 and issued to the transportation department for physicals under a contract between the district and a local physician. The district issued check number 113675 dated August 31, 2005, in the amount of \$5,400 or 1,000 % over the approved amount.

In another instance, district personnel were called into the business office on December 27, 2005, during a holiday break to issue a purchase order and check to Edwards Abstract on the same day (see Exhibit L). In addition, in three instances, purchase orders and checks were issued to Enriquez Enterprises Incorporated on the same day (see Exhibit L). These transactions do not appear to be what would be considered the district's normal business practice;

- b) According to district personnel, internal control procedures called for limitation in the number of staff given access to the district's electronic financial accounting system to input and approve purchase orders. During the time these internal control procedures were in place, campus principals and secretaries came by the business office to use the computers of employees that were signed on to the system in the accounts payable department. This practice may have compromised the internal controls over the purchase order process of the district;
- c) It was also noted that prior to the auditors' visit, payroll advances were granted to district employees. The district's internal audit department also cited the district for granting payroll advances to district employees. However, at the TEA auditors' recommendation, the district ceased allowing payroll advances to be granted to employees;
- d) In addition, it was noted in a memorandum issued by the district's former chief financial officer that excessive overtime had contributed to the overspending of budgeted amounts (see Exhibit M).

Analysis of the district's response to original finding

District staff conducted a purchase order analysis from September 1, 2005 to August 31, 2006, which was the same time period the TEA auditors conducted an analysis. According to the district's analysis, a number of transactions were negotiated without a purchase order. In another analysis, the district found a number of transactions that exceeded the purchase limit (see PDF file: kk binder 9 Transactions and Purchase Orders pages 2 of 10 and 7 of 10). While the district contends that the percentage of items found in each analysis was not alarmingly high, it is to note that the purpose for a purchase order is as follows:

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1. Ensure procurements are properly authorized;

- 2. Ensure that sufficient budgetary dollars exist to meet the proposed expenditure;
- 3. Ensure proper internal control of the procurement process to show that:
 - a. No one person has control of a transaction from beginning to end;
 - District staff members are making informed procurement decisions and using budgeted amounts to guide them in the procurement process;
 - c. Goods are accounted for when received.

On another issue, the district contends that it did not compromise the internal controls over the purchase order system by allowing campus principals and secretaries use of computers of employees signed into the system in the accounts payable department. According to the district, the restrictions in question applied mainly to the student activity accounts, athletic event shares (other districts are entitled to a percentage of the proceeds) and other special revenue funds. Furthermore, according to the district, the transactions relating to these activities were closely monitored under the direct supervision of a staff accountant. It appears that the district has addressed this area of the findings.

On the issue of payroll advances, the district contends that payroll advances were granted for medical and/or family emergencies only. According to the district, at the recommendation of the TEA auditors, the district ceased all payroll advances. It appears that the district has addressed this area of the findings.

On the issue of excessive overtime, according to the district, beginning with fiscal year 2007 district staff members have been diligently monitoring employee overtime including monthly meetings with department heads. In addition, the district indicated that it continues to discuss plans to reduce employee overtime. It appears that the district has addressed this area of the findings.

Required Actions:

- The report be reviewed with the board of trustees, and the district take appropriate steps to comply with the federal and state regulations dealing with competitive procurement.
- The district take steps to ensure that employees on flexible schedules work the appropriate number of hours.
- The district consult with its legal counsel and take steps to ensure that it is in compliance with local board policy BBFB (Legal) dealing with incompatibility of office.
- 4) The district ensure that staffing is in accordance with the number of budgeted positions and that employee salaries are in accordance with the compensation plan adopted by the school board.
- 5) The district seek reimbursement for all inappropriate compensation and/or benefits paid to or on-behalf of the superintendent, his spouse and other district employees.
- 6) The district impute the value for income tax purposes for the personal use of the suburban or a notarized affidavit from the superintendent stating that he did not use the

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suburban for personal use be obtained by the district. We note that the district has taken steps to address this required action in response to the preliminary report.

- 7) The district ensure that it is in compliance with TEC, Section 45.105 dealing with expenditures necessary for the conduct of public schools. In addition, the district should ensure that it is in compliance with Article III, Section 52 of the Texas Constitution dealing with gift of public funds.
- 8) The district should conduct criminal background checks in accordance with its local policy and as required by Department of Public Safety for a school bus operator.
- 9) The district take steps to ensure that it is in compliance with the nepotism laws.
- 10) The district should ensure that purchase orders are completed in accordance with its business procedures. The district ensure that it maintains adequate controls over its purchase order and budgetary process.

ATTACHMENT 5



Notification of Commitment Adjustment Letter Funding Year 2004: July 1, 2004 - June 30, 2005

February 16, 2011

Marie L. Evans

DONNA INDEP SCHOOL DISTRICT

116 North 10th Street

Donna, TX 78537 2702

Re: Form 471 Application Number:

425434

Funding Year:

2004

Applicant's Form Identifier:

FY2004-471-2-108902

Billed Entity Number:

141639

FCC Registration Number:

0005007414 143018592

Service Provider Name:

Integrity Communications

Service Provider Contact Person:

Edwin Mickley IX

Our routine review of Schools and Libraries Program (Program) funding commitments has revealed certain applications where funds were committed in violation of Program rules.

In order to be sure that no funds are used in violation of Program rules, the Universal Service Administrative Company (USAC) must now adjust your overall funding commitment. The purpose of this letter is to make the required adjustments to your funding commitment, and to give you an opportunity to appeal this decision. USAC has determined the applicant is responsible for all or some of the violations. Therefore, the applicant is responsible to repay all or some of the funds disbursed in error (if any).

This is NOT a bill. If recovery of disbursed funds is required, the next step in the recovery process is for USAC to issue you a Demand Payment Letter. The balance of the debt will be due within 30 days of that letter. Failure to pay the debt within 30 days from the date of the Demand Payment Letter could result in interest, late payment fees, administrative charges and implementation of the "Red Light Rule." The FCC's Red Light Rule requires USAC to dismiss pending FCC Form 471 applications if the entity responsible for paying the outstanding debt has not paid the debt, or otherwise made satisfactory arrangements to pay the debt within 30 days of the notice provided by USAC. For more information on the Red Light Rule, please see "Red Light Frequently Asked Questions (FAQs)" posted on the FCC website at http://www.fcc.gov/debt_collection/faq.html.

TO APPEAL THIS DECISION:

You have the option of filing an appeal with USAC or directly with the Federal Communications Commission (FCC).

If you wish to appeal the Commitment Adjustment Decision indicated in this letter to USAC your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. In your letter of appeal:

- 1. Include the name, address, telephone number, fax number, and email address (if available) for the person who can most readily discuss this appeal with us.
- 2. State outright that your letter is an appeal. Identify the date of the Notification of Commitment Adjustment Letter and the Funding Request Number(s) (FRN) you are appealing. Your letter of appeal must include the *Billed Entity Name,
- *Form 471 Application Number,
- *Billed Entity Number, and
- *FCC Registration Number (FCC RN) from the top of your letter.
- 3. When explaining your appeal, copy the language or text from the Notification of Commitment Adjustment Letter that is the subject of your appeal to allow USAC to more readily understand your appeal and respond appropriately. Please keep your letter to the point, and provide documentation to support your appeal. Be sure to keep a copy of your entire appeal including any correspondence and documentation.
- 4. If you are an applicant, please provide a copy of your appeal to the service provider(s) affected by USAC's decision. If you are a service provider, please provide a copy of your appeal to the applicant(s) affected by USAC's decision.
- Provide an authorized signature on your letter of appeal.

To submit your appeal to us on paper, send your appeal to:

Letter of Appeal Schools and Libraries Division - Correspondence Unit 100 S. Jefferson Rd. F. O. Box 902 Whippany, NJ 07981

For more information on submitting an appeal to USAC, please see the "Appeals Procedure" posted on our website.

If you wish to appeal a decision in this letter to the FCC, you should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received by the FCC or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. We strongly recommend that you use the electronic filing options described in the "Appeals Procedure" posted on our website. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street SW, Washington, DC 20554.

FUNDING COMMITMENT ADJUSTMENT REPORT

On the pages following this letter, we have provided a Funding Commitment Adjustment Report (Report) for the Form 471 application cited above. The enclosed Report includes the Funding Request Number(s) from your application for which adjustments are necessary. See the "Guide to USAC Letter Reports" posted at http://usac.org/sl/tools/reference/guide-usac-letter-reports.aspx for more information on each of the fields in the Report. USAC is also sending this information to your service provider(s) for informational purposes. If USAC has determined the service provider is also responsible for any rule violation on the FRN(s), a separate letter will be sent to the service provider detailing the necessary service provider action.

Note that if the Funds Disbursed to Date amount is less than the Adjusted Funding Commitment amount, USAC will continue to process properly filed invoices up to the Adjusted Funding Commitment smount. Review the Funding Commitment Adjustment Explanation in the attached Report for an explanation of the reduction to the commitment(s). Please ensure that any invoices that you or your service provider(s) submits to USAC are consistent with Program rules as indicated in the Funding Commitment Adjustment Explanation. If the Funds Disbursed to Date amount exceeds your Adjusted Funding Commitment amount, USAC will have to recover some or all of the disbursed funds. The Report explains the exact amount (if any) the applicant is responsible for repaying.

Schools and Libraries Division Universal Services Administrative Company

cc: Edwin Mickley IX
Integrity Communications

Funding Commitment Adjustment Report for Form 471 Application Number: 425434

Funding Request Number: 1176490

Services Ordered: INTERNAL CONNECTIONS

SPIN: 143018592

Service Provider Name: Integrity Communications

Contract Number: TPC-DISD-448
Billing Account Number: 9564641622

Site Identifier: 141639

Original Funding Commitment: \$2893,099.01 Commitment Adjustment Amount: \$2893,099.01

Adjusted Funding Commitment: \$0.00

Funds Disbursed to Date \$2833,789.66 Funds to be Recovered from Applicant: \$2833,789.66

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. On your request for an operational SPIN change submitted on September 2, 2005 to USAC, you certified that the SPIN change requested was allowed under all applicable state and local procurement laws. During an audit, it was determined that you did not comply with Texas State Government Code 2157.0611 that required the evaluation of three bids for purchases exceeding \$2,000, or documentation explaining why three bids could not be obtained. Since you failed to follow the applicable state procurement rules, the approved SPIN change is deemed invalid. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant.

ATTACHMENT 6

MEMBERS Yvonne Davis Wayne Christian Eddie Rodriguez William "Bill" Zedler José Aliseda Stefani Carter Cindy Burkett



Will Hartnett
Vice Chair
Michael Pacheco
Committee Clerk
Moises Morales
Assistant Clerk

COMMITTEE ON CRIMINAL JURISPRUDENCE Pete P. Gallego CHAIRMAN

CMRRR#7008 1140 0000 8844 1363

The Honorable Greg Abbott
Office of the Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Attention: Opinion Request Division

Re: Whether Texas Local Government Code §2157.0611 applies to school districts

Dear General Abbott:

I respectfully request an opinion on the above referenced matter that has been brought to my attention. The Donna Independent School District (DISD) came to me about a concern raised in a July 10, 2006, memorandum (attached) to Adrain Johnson, Associate Commissioner, School District Services, pertaining to an investigation of DISD. Specifically, "Concern 1" in the memorandum alleges that DISD violated Texas Local Government Code §2157.0611.

Texas Local Government Code §2157.0611 states:

A catalog purchase or lease that exceeds \$5,000 or that is made under a written contract shall, when possible, be based on an evaluation of at least three catalog offers made to the commission or other state agency by catalog information systems vendors. If at least three catalog offers are not evaluated by the commission or other state agency before a purchase of lease is made that exceeds the threshold amount or is made under a written contract, the commission or other agency shall document the reasons for that fact before making the purchase or lease under Section 2157.063.

Attorney General Greg Abbott RE: Donna Independent School District May 5, 2011
Page 2

DISD's analysis of this issue begins with Texas Local Government Code §2157.02. Code §2157 which states:

"Subchapters A, B, and D of Texas Local Government Code chapter 2157 apply only to a *state* agency to which Chapter 2054 applies." (emphasis added)

Under Texas Local Government Code §2054.003, a "state agency" is defined as "a department, commission, board, office, council, authority, or other agency in the executive or judicial branch of state government that is created by the constitution or a statute of this state, including a university system or institution of higher education as defined by Section 61.003, Education Code." Under this same section, a "local government" is defined as "a county, municipality, special district, school district, junior college district, or other political subdivision of the state."

By definition, DISD is a local governing body and is not considered a state agency. Texas Local Government Code §2157.0611 applies only to commissions or other state agencies; thus, Texas Local Government Code §2157.0611 can not apply to DISD.

Moreover, Texas Education Code §44.031 controls the method by which school districts are required to enter into contracts. Section 44.031 states "all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value for the district: (emphasis added)

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) a request for proposals, for services other than construction services;
- (4) a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
- (5) an interlocal contract;
- (6) a design/build contract;
- (7) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager;
- (8) a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility;
- (9) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
- (10) the formation of a political subdivision corporation under Section 304.001, Local Government Code."

DISD takes the position that, pursuant to Texas Education Code §44.031, a school district is free to choose whichever of the above-referenced methods that provides the best value to the district. Competitive bidding is included as an option, but it is not the only option a school district has.

Attorney General Greg Abbott RE: Donna Independent School District May 5, 2011 Page 3

In conclusion, I request your opinion in this question brought by DISD as to whether Texas Local Government Code §2157.0611 applies to school districts too. If there is any further information you need please do not hesitate to contact my office.

Sincerely,

Pete P. Gallego

PPG/mp



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Human Resources

Donna Independent School District

"Committed to Excellence"

116 North 10th Street * Donna, Texas 78537 Voice: (956) 464-1607 Fax: (956) 461-4303

April 5, 2011

Letter of Appeal Schools and Libraries Division – Correspondence Unit 30 Lanidex Plaza West P.O. Box 685 Parsippany, New Jersey 07054-0685

SUBJECT: Appeal of "Notification of Commitment Adjustment Letters"

Billed Entity Name: DONNA INDEPENDENT SCHOOL DISTRICT

BEN: 141639

Funding Year: 2002

Date of COMAD Letters: February 10, 2010

Form 471: 437253 FRN: 1215901 Form 471: 437259 FRN: 1215911

Form 471: 437252 FRN: 1215900 Form 471: 437255 FRN: 1215903 Form 471: 437256

FRN: 1215904

Funding Year: 2004

Date of COMAD Letters: February 10 and 16, 2010

Form 471: 425806 FRN: 1177559 Form 471: 425434 FRN: 1176490

CONTACT PERSON: Daniel L. Farslow, E-Rate Central

Phone: 614-487-9567 FAX: 614-487-9362

E-mail: <u>dfarslow@e-ratecentral.com</u>

RATIONALE FOR COMMITMENT ADJUSTMENT (COMAD) DECISION: "On your request for an operational SPIN change submitted on September 2, 2005 to USAC, you certified that the SPIN change requested was allowed under all applicable state and local procurement laws. During an audit, it was determined that you did not comply with Texas State Government Code 2157.0611 that required the evaluation of three bids for purchases exceeding \$2,000, or documentation explaining why three bids could not be obtained. Since you failed to follow the applicable state procurement rules, the approved SPIN change is deemed invalid. Accordingly, your funding commitment will be rescinded in full and USAC will seek recovery of any disbursed funds from the applicant." The same rationale was used for all FRNs.

DISCUSSION

Donna ISD respectfully appeals the USAC decision to adjust the commitments and recover the disbursed funds awarded through the seven (7) FRNs listed above because we are of the opinion, and have it on sound legal advice, that the citation of Texas Government Statute §2157.0611 by the Texas Education Agency (TEA) as the founding element of "Concern 1" listed in their "Audit Findings Report" of July 10, 2007¹, and utilized by USAC as grounds for the commitment adjustment decision, was incorrectly determined through an error in the application of Texas Statutory Code. Donna ISD has cause to believe that Texas Government Statute §2157.0611 does not, in fact of law, apply to "local government" entities such as school districts, thereby invalidating the TEA "Concern 1" as stated in their July 10, 2007 Report.

Donna ISD, through actions of legal counsel, has formally challenged the validity of the Audit "Concern 1" and has requested a "re-evaluation of how Texas Local Government Code §2157.0611 applies to school districts" through a letter from our legal counsel to the TEA's Director of Financial Audits.² In addition Donna ISD has requested a formal opinion from the Texas Attorney General as to the applicability of State Statute §2157.0611 to "local government" entities such as Donna ISD.³ We are confident that the results of these actions will be a determination that TEA came to the negative finding in "Concern 1" in error through misapplication of Texas Government Statutes and that TEA will ultimately report that Donna ISD did not violate state procurement rules when applying for the operational SPIN change September 2, 2005.

Donna ISD respectfully requests that USAC rescind the COMAD notifications based on the legal interpretations provided by legal counsel or, at a minimum, hold any decision on this appeal and any action on the COMAD Letters listed above in abeyance while the legal requests for reevaluation and opinion take their course and come to resolution through appropriate Texas statutory channels.

¹ Attachment 1: "Donna ISD TEA Audit Findings Report – July 10, 2007"

² Attachment 2: Letter to TEA Director of Financial Audits entitled: "Re: July 10, 2007 Memorandum to Adrian Johnson ("the memorandum"), Associate Commissioner, School District Services, pertaining to Donna Independent School District; Investigation #108-902" dated March 28, 2010.

³ Attachment 3: Letter to Office of Texas Attorney General entitled: "Re: Whether Texas Local Government Code §2157.0611 applies to school districts"

Finally, we stress the fact that given the length of time that has already passed regarding resolution of these issues, a rush to judgment on this appeal would not be in the best interest of either USAC or Donna ISD. We are confident that the Texas Education Agency "Concern 1" cited by USAC as grounds for the COMAD will be found to be in error and will be rescinded.

Thank you for your consideration of Donna ISD's Appeal.

Roberto F. Loredo

Superintendent of Schools

Roberts 7. Localo





Date: April 22, 2011

Daniel Farslow RE: Donna ISD 614-487-9567

Application Number(s): 437253, 437259, 437252, 437255, 437256, 425806, 425434

Response Due Date: May 7, 2011

The Program Compliance team is in the process of reviewing your appeal of your Funding Year 2002 and 2004 Funding Commitment Decision Letter. To complete our review, we need some additional information. The information needed to complete the review is listed below.

According to your appeal letter, you state that based on the legal interpretations provided by your legal counsel, Texas Local Government Code §2157.0611 does not apply to Donna Independent School District (Donna ISD) and therefore is not in violation of the state procurement rules when applying for the operational SPIN change. Donna ISD has requested the formal opinions of the Texas Education Agency's Director of Financial Audits and the Texas Attorney General in regards to the Texas Local Government Code §2157.0611. At the time you submitted the appeal, you did not provide the formal opinions from the two parties. Please provide the supporting documentation.

Please fax or email the requested information to my attention. If you have any questions or you do not understand what we are requesting, please feel free to contact me.

It is important that we receive all of the information requested within 15 calendar days so we can complete our review. Failure to respond may result in a reduction or denial of funding. If you need additional time to prepare your response, please let me know as soon as possible.

Should you wish to cancel your appeal, Form 471 application(s), or any of your individual funding requests, please clearly indicate in your response that it is your intention to cancel an appeal, application or funding request(s). Include in any cancellation request the appeal information, Form 471 application number(s) and/or funding request number(s), and the complete name, title and signature of the authorized individual.

Thank you for your cooperation and continued support of the Universal Service Program.

Sincerely,

Jennifer Baumann Associate Manager Program Compliance Unit Phone: 973-581-6726

Fax: 973-599-6525

E-mail: jbauman@sl.universalservice.org



ATTORNEY GENERAL OF TEXAS

June 29, 2011

The Honorable Pete P. Gallego Chair, Committee on Criminal Jurisprudence Texas House of Representatives Post Office Box 2910 Austin, Texas 78768-2910 Via E-Mail

Re:

Whether section 2157.0611, Government Code, is still in effect and, if so, whether it is applicable to an independent school district (RQ-0980-GA)

Dear Representative Gallego:

We have received your letter dated May 5, 2011 and have designated it as Request No. 0980-GA. Please refer to that number in future correspondence with us about this matter. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received unless we notify the requestor in writing before that day that the opinion will be delayed or not rendered. We received your request on June 27, 2011, setting a due date for your opinion of December 24, 2011. We will respond by that date, or before if possible.

By copy of this letter we are notifying those listed below of your request and asking them to submit briefs if they care to do so. If you are aware of other interested parties, please let us know as soon as possible. We ask that the briefs be submitted by July 29, 2011 to ensure that the Opinion Committee will have adequate time to review and consider arguments relevant to the request from all interested parties. Written submissions are most useful because the members of the Opinion Committee are not available to comment on or discuss the merits of legal questions at issue in an opinion request. Please note that briefs and other correspondence are subject to the Public Information Act.

Very truly yours,

Jason Boatright

Chair, Opinion Committee

JEB/WAH/rem

Attachment: Request No. 0980-GA

The Honorable Pete P. Gallego - Page 2

cc: Ms. Karen Robinson, Executive Director, Texas Department of Information Resources

Mr. Robert Scott, Commissioner of Education, Texas Education Agency

Mr. Jon Heining, General Counsel, Texas Legislative Council

Ms. Debbie Irvine, Executive Director, Texas Legislative Council

Mr. Robert F. Loredo, Superintendent, Donna Independent School District

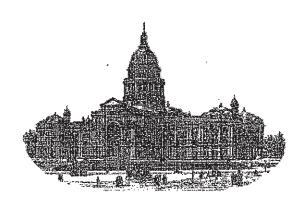
Mr. Johnny Veselka, Executive Director, Texas Association of School Administrators

Ms. Joy Baskin, Director of Legal Services, Texas Association of School Boards

Ms. Gwen Santiago, Executive Director, Texas Association of School Business Officials

Ms. Teresa Spears, Governor's Appointment Director, Office of the Governor

MEMBERS Yvonne Davis Wayne Christian Eddie Rodriguez William "Bill" Zedler José Aliseda Stefani Carter Cindy Burkett



Will Hartnett Vice Chair

Michael Pacheco Committee Clerk

Moises Morales Assistant Clerk

COMMITTEE ON CRIMINAL JURISPRUDENCE

RECEIVED

Pete P. Gallego CHAIRMAN FILE # ML-46770-11 I.D. # 46770

JUN 27 2011

OPINION COMMITTEE

CMRRR#7008 1140 0000 8844 1363

The Honorable Greg Abbott
Office of the Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Attention: Opinion Request Division

Re: Whether Texas Local Government Code §2157.0611 applies to school districts

Dear General Abbott:

I respectfully request an opinion on the above referenced matter that has been brought to my attention. The Donna Independent School District (DISD) came to me about a concern raised in a July 10, 2006, memorandum (attached) to Adrain Johnson, Associate Commissioner, School District Services, pertaining to an investigation of DISD. Specifically, "Concern 1" in the memorandum alleges that DISD violated Texas Local Government Code §2157.0611.

Texas Local Government Code §2157.0611 states:

A catalog purchase or lease that exceeds \$5,000 or that is made under a written contract shall, when possible, be based on an evaluation of at least three catalog offers made to the commission or other state agency by catalog information systems vendors. If at least three catalog offers are not evaluated by the commission or other state agency before a purchase of lease is made that exceeds the threshold amount or is made under a written contract, the commission or other agency shall document the reasons for that fact before making the purchase or lease under Section 2157.063.

Attorney General Greg Abbott RE: Donna Independent School District May 5, 2011 Page 2

DISD's analysis of this issue begins with Texas Local Government Code §2157.02. Code §2157 which states:

"Subchapters A, B, and D of Texas Local Government Code chapter 2157 apply only to a state agency to which Chapter 2054 applies." (emphasis added)

Under Texas Local Government Code §2054.003, a "state agency" is defined as "a department, commission, board, office, council, authority, or other agency in the executive or judicial branch of state government that is created by the constitution or a statute of this state, including a university system or institution of higher education as defined by Section 61.003, Education Code." Under this same section, a "local government" is defined as "a county, municipality, special district, school district, junior college district, or other political subdivision of the state."

By definition, DISD is a local governing body and is not considered a state agency. Texas Local Government Code §2157.0611 applies only to commissions or other state agencies; thus, Texas Local Government Code §2157.0611 can not apply to DISD.

Moreover, Texas Education Code §44.031 controls the method by which school districts are required to enter into contracts. Section 44.031 states "all school district contracts, except contracts for the purchase of produce or vehicle fuel, valued at \$25,000 or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value for the district: (emphasis added)

- (1) competitive bidding;
- (2) competitive sealed proposals;
- (3) a request for proposals, for services other than construction services;
- (4) a catalogue purchase as provided by Subchapter B, Chapter 2157, Government Code;
- (5) an interlocal contract:
- (6) a design/build contract;
- (7) a contract to construct, rehabilitate, alter, or repair facilities that involves using a construction manager;
- (8) a job order contract for the minor construction, repair, rehabilitation, or alteration of a facility:
- (9) the reverse auction procedure as defined by Section 2155.062(d), Government Code; or
- (10) the formation of a political subdivision corporation under Section 304.001, Local Government Code."

DISD takes the position that, pursuant to Texas Education Code §44.031, a school district is free to choose whichever of the above-referenced methods that provides the best value to the district. Competitive bidding is included as an option, but it is not the only option a school district has.

Attorney General Greg Abbott RE: Donna Independent School District May 5, 2011 Page 3

In conclusion, I request your opinion in this question brought by DISD as to whether Texas Local Government Code §2157.0611 applies to school districts too. If there is any further information you need please do not hesitate to contact my office.

Sincerely,

Pete P. Gallego

PPG/mp

Text

Bill: HB 2918

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House: Adjourned until Wed, Apr 27, 2011 10:00 amAdjourned until Wed, Apr 27, 2011 10:00 Senate: Recessed until Thu, Apr 28, 2011 8:00 amRecessed until Thu, Apr 28, 2011 8:00 am

Council Document: 80R 3102 TAD-F

Bill:

Add to Bill List

Legislative Session: 80(R)

Actions Companions Amendments Authors Sponsors Captions Bill Stages

Last Action: 06/15/2007 E Effective on 9/1/07

Caption Version:

Caption Text: Relating to state information technology contracting and procurement practices.

Author: Isett, Carl

Sponsor: Deuell

Subjects:

Electronic Information Systems (I0311)
Purchasing--State (I0643)
State Agencies, Boards & Commissions (I0749)
INFORMATION RESOURCES, DEPARTMENT OF (V9827)

Comment

<u>Date</u> ▼

Time

Journal Page

House Committee: Government Reform Status: Out of committee

Vote: Ayes=5 Nays=0 Present Not Voting=0 Absent=2

Senate Committee: **Government Organization**

Status: Out of committee

Description

Vote: Ayes=4 Nays=0 Present Not Voting=0 Absent=3

Actions: (descending date order)

Viewing Votes: Most Recent House Vote | Most Recent Senate Vote

		Date		
E Effective on 9/1/07		06/15/2007		
E Signed by the Governor		06/15/2007		7406
E Sent to the Governor		05/28/2007		7403
S Signed in the Senate		05/27/2007		5192
H Signed in the House		05/25/2007		6448
H Reported enrolled		05/25/2007	08:05 AM	6651
S House concurs in Senate amendment	(s)-reported	05/24/2007		3620
H Text of Senate Amendment(s)		05/24/2007		5723
H Statement(s) of vote recorded in Jou	<u>rnal</u>	05/24/2007		5724
H Record vote	RV#1719	05/24/2007		5723
H House concurs in Senate amendment	(s)	05/24/2007		5723
H Senate Amendments Analysis distribu	uted	05/22/2007	08:39 PM	
H Senate Amendments printed and dist		05/22/2007	10:39 PM	
H Senate passage as amended reported	1	05/22/2007		5148
S Record vote		05/22/2007		2734
S <u>Passed</u>		05/22/2007		2734
S Read 3rd time		05/22/2007		2734
S Record vote		05/22/2007		2734
S Three day rule suspended		05/22/2007		2734
S Vote recorded in Journal		05/22/2007		2734
S Passed to 3rd reading as amended		05/22/2007		2734
S Vote recorded in Journal		05/22/2007		2734
S <u>Amended</u>		05/22/2007		2734
S Amendment(s) offered	FA1 Deuell	05/22/2007		2734
S Read 2nd time		05/22/2007		2733
S Rules suspended-Regular order of bu	siness	05/22/2007		2733
S Placed on intent calendar		05/22/2007		
S Committee report printed and distribu	uted	05/20/2007	04:41 PM	
S Recommended for local & unconteste	d calendar	05/19/2007		
S Reported favorably as substituted		05/19/2007		2392
S Testimony taken in committee		05/16/2007		
S Considered in public hearing		05/16/2007		
S Posting rule suspended		05/16/2007		2143
S Scheduled for public hearing on		05/16/2007		
S Referred to Government Organization	1	05/10/2007		1922
S Read first time		05/10/2007		1922
S Received from the House		05/09/2007		1812
H Reported engrossed		05/08/2007	08:18 PM	3682
H Record vote	RV#1051	05/08/2007		3350
H Passed		05/08/2007		3350
H Read 3rd time		05/08/2007		3350
H Passed to engrossment		05/08/2007		3336
H Read 2nd time		05/08/2007		3336

H Placed on Local, Consent, and Res. Calendar	05/08/2007	
H Considered in Local & Consent Calendars	05/04/2007	
H Comm. report sent to Local & Consent Calendar	05/01/2007	
H Committee report printed and distributed	05/01/2007 09:08 AM	
H Comte report filed with Committee Coordinator	04/30/2007	2824
H Reported favorably as substituted	04/23/2007	
H Recommended to be sent to Local & Consent	04/23/2007	
H Committee substitute considered in committee	04/23/2007	
H Considered in public hearing	04/23/2007	
H Left pending in committee	04/16/2007	
H Committee substitute considered in committee	04/16/2007	
H Considered in public hearing	04/16/2007	
H Scheduled for public hearing on	04/16/2007	
H Referred to Government Reform	03/15/2007	954
H Read first time	03/15/2007	954
H Filed	03/07/2007	

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2	relating to state information technology contracting and
3	procurement practices.
4	BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
5	SECTION 1. Section 44.031(a), Education Code, is amended to
6	read as follows:
7	(a) Except as provided by this subchapter, all school
8	district contracts, except contracts for the purchase of produce or
9	vehicle fuel, valued at \$25,000 or more in the aggregate for each
LO	12-month period shall be made by the method, of the following
L1	methods, that provides the best value for the district:
L2	(1) competitive bidding;
L3	<pre>(2) competitive sealed proposals;</pre>
L4	(3) a request for proposals, for services other than
L5	construction services;
L6	(4) [a catalogue purchase as provided by Subchapter B,
L7	Chapter 2157, Government Code;
L8	[(5)] an interlocal contract;
L9	(5) [(6)] a design/build contract;
20	(6) $[(7)]$ a contract to construct, rehabilitate,
21	alter, or repair facilities that involves using a construction
22	manager;
23	(7) [(8)] a job order contract for the minor
24	construction, repair, rehabilitation, or alteration of a facility;

AN ACT

1

- 1 (8) (9) the reverse auction procedure as defined by
- 2 Section 2155.062(d), Government Code; or
- 3 (9) $[\frac{(10)}{(10)}]$ the formation of a political subdivision
- 4 corporation under Section 304.001, Local Government Code.
- 5 SECTION 2. The heading to Section 2054.0565, Government
- 6 Code, is amended to read as follows:
- 7 Sec. 2054.0565. USE OF CONTRACTS BY OTHER [GOVERNMENTAL]
- 8 ENTITIES.
- 9 SECTION 3. Section 2054.0565, Government Code, is amended
- 10 by amending Subsection (a) and adding Subsections (c) and (d) to
- 11 read as follows:
- 12 (a) The department may include terms in a procurement
- 13 contract entered into by the department, including a contract
- 14 entered into under Section 2157.068, that allow the contract to be
- 15 used by another state agency, a political subdivision of this
- 16 state, [er] a governmental entity of another state, or an
- 17 assistance organization as defined by Section 2175.001.
- 18 (c) Notwithstanding any other law, a state governmental
- entity that is not a state agency as defined by Section 2054.003 may
- 20 use a contract as provided by Subsection (a) without being subject
- 21 to a rule, statute, or contract provision, including a provision in
- 22 a contract entered into under Section 2157.068, that would
- 23 <u>otherwise require the state governmental entity to:</u>
- 24 (1) sign an interagency agreement; or
- 25 (2) disclose the items purchased or the value of the
- 26 purchase.
- 27 (d) A state governmental entity that is not a state agency

- 1 as defined by Section 2054.003 that uses a contract as provided by
- 2 Subsection (a) may prohibit a vendor from disclosing the items
- 3 purchased, the use of the items purchased, and the value of the
- 4 purchase.
- 5 SECTION 4. Section 2054.301, Government Code, is amended to
- 6 read as follows:
- 7 Sec. 2054.301. APPLICABILITY; DEFINITION. (a) This
- 8 subchapter applies only to:
- 9 (1) a major information resources project; and
- 10 (2) a major contract.
- 11 (b) In this subchapter, "major contract" means a major
- 12 contract as defined by Section 2262.001(4) under which a vendor
- 13 will perform or manage an outsourced function or process.
- SECTION 5. Sections 2054.303(a) and (c), Government Code,
- 15 are amended to read as follows:
- 16 (a) For each proposed major information resources project
- or major contract, a state agency must prepare:
- 18 (1) a business case providing the initial
- 19 justification for the project or contract, including the
- 20 anticipated return on investment in terms of cost savings and
- 21 efficiency for the project or contract; and
- 22 (2) a statewide impact analysis of the project's or
- 23 contract's effect on the state's common information resources
- infrastructure, including the possibility of reusing code or other
- 25 resources.
- 26 (c) The department shall use the analysis to ensure that the
- 27 proposed project or major contract does not unnecessarily duplicate

- 1 existing statewide information resources technology.
- 2 SECTION 6. Section 2054.304, Government Code, is amended to
- 3 read as follows:
- 4 Sec. 2054.304. PROJECT PLANS. (a) A state agency shall
- 5 develop a project plan for each major information resources project
- 6 <u>or major contract</u>.
- 7 (b) Except as provided by Subsection (c), the state agency
- 8 must file the project plan with the quality assurance team and the
- 9 Texas Building and Procurement Commission before the agency:
- 10 (1) spends more than 10 percent of allocated funds for
- 11 the project or major contract; or
- 12 (2) first issues a vendor solicitation for the project
- or contract.
- 14 (c) Unless the project plan has been filed under this
- 15 section:
- 16 (1) the Texas Building and Procurement Commission may
- 17 not issue a vendor solicitation for the project or major contract;
- 18 and
- 19 (2) the agency may not post a vendor solicitation for
- 20 the project or contract in the state business daily under Section
- 21 2155.083.
- 22 SECTION 7. Section 2054.305, Government Code, is amended to
- 23 read as follows:
- Sec. 2054.305. PROCUREMENT PLAN AND METHOD FOR MONITORING
- 25 CONTRACTS. Before issuing a vendor solicitation for a project or
- 26 major contract, the state agency must develop, consistent with
- 27 department guidelines:

- 1 (1) a procurement plan with anticipated service levels
- 2 and performance standards for each vendor; and
- 3 (2) a method to monitor changes to the scope of each
- 4 contract.
- 5 SECTION 8. Section 2155.502, Government Code, is amended by
- 6 amending Subsections (b) and (c) and adding Subsection (e) to read
- 7 as follows:
- 8 (b) In developing a [the] schedule under Subsection (a) or
- 9 (e), the commission or department, as appropriate, shall modify any
- 10 contractual terms, with the agreement of the parties to the
- 11 contract, as necessary to comply with any federal or state
- 12 requirements, including rules adopted under this subchapter.
- 13 (c) The commission may not list a multiple award contract on
- 14 a schedule developed under Subsection (a) [this section] if the
- 15 goods or services provided by that contract:
- 16 (1) are available from only one vendor; [or]
- 17 (2) are telecommunications services, facilities, or
- 18 equipment; or
- 19 (3) are commodity items as defined by Section
- 20 2157.068(a).
- 21 (e) The department may develop a schedule of multiple award
- contracts for commodity items as defined by Section 2157.068(a)
- 23 using the criteria established under Subsection (a).
- SECTION 9. Subchapter A, Chapter 2157, Government Code, is
- amended by adding Section 2157.006 to read as follows:
- Sec. 2157.006. PURCHASING METHODS. (a) The commission or
- 27 other state agency shall purchase an automated information system

- 1 using:
- 2 (1) the purchasing method described by Section
- 3 2157.068 for commodity items; or
- 4 (2) a purchasing method designated by the commission
- 5 to obtain the best value for the state, including a request for
- 6 offers method.
- 7 (b) A local government may purchase an automated
- 8 <u>information system using a method listed under Subsection (a). A</u>
- 9 local government that purchases an item using a method listed under
- 10 <u>Subsection</u> (a) satisfies any state law requiring the local
- 11 government to seek competitive bids for the purchase of the item.
- 12 <u>(c) The commission shall adopt rules for designating</u>
- 13 purchasing methods under Subsection (a)(2).
- 14 SECTION 10. The heading to Subchapter B, Chapter 2157,
- 15 Government Code, is amended to read as follows:
- 16 SUBCHAPTER B. <u>COMMODITY ITEMS</u> [CATALOG PURCHASE METHOD]
- 17 SECTION 11. The heading to Section 2157.068, Government
- 18 Code, is amended to read as follows:
- 19 Sec. 2157.068. PURCHASE OF INFORMATION TECHNOLOGY
- 20 COMMODITY ITEMS.
- 21 SECTION 12. Section 2157.068, Government Code, is amended
- 22 by amending Subsection (b) and adding Subsection (i) to read as
- 23 follows:
- 24 (b) The department shall negotiate with [catalog
- 25 <u>information systems</u>] vendors to attempt to obtain a favorable price
- 26 for all of state government on licenses for commodity items, based
- 27 on the aggregate volume of purchases expected to be made by the

- 1 state. The terms and conditions of a license agreement between a
- 2 vendor and the department under this section may not be less
- 3 favorable to the state than the terms of similar license agreements
- 4 between the vendor and retail distributors.
- 5 (i) Unless the agency has express statutory authority to
- 6 employ a best value purchasing method other than a purchasing
- 7 method designated by the commission under Section 2157.006(a)(2), a
- 8 state agency shall use a purchasing method provided by Section
- 9 2157.006(a) when purchasing a commodity item if:
- 10 <u>(1) the agency has obtained an exemption from the</u>
- 11 department or approval from the Legislative Budget Board under
- 12 Subsection (f); or
- 13 (2) the agency is otherwise exempt from this section.
- 14 SECTION 13. Section 2262.051, Government Code, is amended
- 15 by adding Subsection (h) to read as follows:
- 16 (h) The guide must establish procedures for major contracts
- 17 that outsource a state function or process to a contractor,
- 18 including when applicable the use of documents required under
- 19 Subchapter J, Chapter 2054.
- SECTION 14. Section 2262.053(b), Government Code, is
- 21 amended to read as follows:
- 22 (b) The training must provide the contract manager with
- 23 information regarding how to:
- 24 (1) fairly and objectively select and negotiate with
- 25 the most qualified contractor;
- 26 (2) establish prices that are cost-effective and that
- 27 reflect the cost of providing the service;

- 1 (3) include provisions in a contract that hold the
- 2 contractor accountable for results;
- 3
 (4) monitor and enforce a contract;
- 4 (5) make payments consistent with the contract; [and]
- 5 (6) comply with any requirements or goals contained in
- 6 the contract management guide; and
- 7 (7) use and apply advanced sourcing strategies,
- 8 techniques, and tools.
- 9 SECTION 15. Section 60.454, Water Code, is amended to read
- 10 as follows:
- 11 Sec. 60.454. PURCHASING CONTRACT METHODS. Notwithstanding
- 12 any other provision of this chapter or other law, a district
- 13 contract valued at \$25,000 or more in the aggregate for each
- 14 12-month period may be made by the method below that, in the opinion
- of the district's commission, provides the best value for the
- 16 district:
- 17 (1) a design-build contract to construct,
- 18 rehabilitate, alter, or repair facilities;
- 19 (2) a contract to construct, rehabilitate, alter, or
- 20 repair facilities that involves using a construction manager-agent
- 21 or construction manager-at-risk;
- 22 (3) competitive sealed proposals;
- 23 (4) a job order contract for the construction, repair,
- 24 rehabilitation, or alteration of a facility;
- 25 (5) a request for proposals, if the contract is for
- 26 services other than construction services;
- 27 (6) competitive sealed bids;

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(7) [a catalog purchase as provided by Subchapter B,
 1
 2
     Chapter 2157, Government Code;
 3
                 [\frac{(8)}{}] an interlocal contract as provided by Chapter
 4
     791, Government Code;
 5
                 (8) [\frac{9}{9}] the reverse auction procedure as defined by
 6
     Section 2155.062(d), Government Code;
 7
                 (9) \left[\frac{(10)}{(10)}\right] a contract with the
                                                         United
                                                                  States,
 8
     including any agency thereof; or
 9
                 (10) [\frac{(11)}{(11)}] a contract with this state, including an
10
     agency of this state.
           SECTION 16. The following sections are repealed:
11
                      2155.507, Government Code;
12
                 (1)
                      2157.061, Government Code;
13
                 (2)
                      2157.0611, Government Code;
14
                 (3)
15
                 (4)
                      2157.062, Government Code;
                      2157.063, Government Code;
16
                 (5)
                      2157.066, Government Code; and
17
                 (6)
                      2157.067, Government Code.
18
                 (7)
           SECTION 17. Subchapter J, Chapter 2054, Government Code, as
19
     amended by this Act, applies only to a major contract entered into
20
     on or after the effective date of this Act. A major contract
21
22
     entered into before the effective date of this Act is governed by
     the law in effect on the date the contract was entered into, and the
23
24
     former law is continued in effect for that purpose.
25
           SECTION 18. The Texas Building and Procurement Commission
     must comply with Sections 2157.006(c) and 2262.051(h), Government
26
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Code, as added by this Act, and Section 2262.053(b), Government

27

- 1 Code, as amended by this Act, not later than October 1, 2007.
- 2 SECTION 19. This Act takes effect September 1, 2007.

President of the Senate	Speaker of the House
I certify that H.B. No.	2918 was passed by the House on May 8,
2007, by the following vote:	Yeas 146, Nays 0, 2 present, not
voting; and that the House co	ncurred in Senate amendments to H.B.
No. 2918 on May 24, 2007, by th	ne following vote: Yeas 141, Nays 0,
2 present, not voting.	
	Chief Clerk of the House
I certify that H.B. No.	2918 was passed by the Senate, with
amendments, on May 22, 2007, b	y the following vote: Yeas 30, Nays
0.	
	Secretary of the Senate
APPROVED:	
Date	
Governor	